ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 19, 2012

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street Northeast
Washington, D.C. 20549

Dear Chairman Schapiro:

I appreciate the Securities and Exchange Commission (the Commission) efforts to promote public understanding of the issues facing U.S. capital markets and the steps the Commission has taken to improve the outlook for capital formation in our country; however, more can be done. The purpose of this letter is to seek your input on the current regulatory structure relating to Initial Public Offerings (IPOs). As you know, our economy faces serious headwinds and requires increased investment to foster economic growth and create jobs. The Facebook IPO taught us that, at a minimum, the IPO process suffers substantial flaws. In fact, it appears the entire IPO regulatory framework, based on an outdated Securities Act of 1933, fails to provide a market-based solution to IPO pricing.

## I. The Facebook IPO

On February 1, 2012, Facebook Inc. officially announced plans for its widely anticipated IPO, which was eventually executed on May 18, 2012.[1] Following its official announcement, Facebook issued registration statements that expressed caution about revenue growth, increased the IPO price range, and increased the total number of shares offered.[2] In the week preceding the IPO, underwriters held a "road show" for investors – all while in-house analysts were simultaneously downgrading internal forecasts. These new forecasts were not directly disclosed during the road show; nonetheless, consistent with the law, select institutional investors were privileged with the negative information.[3] At the launch, Facebook shares, initially priced at $38, began trading at $42.00 and reached $45.00 before closing at $38.23. Since then, Facebook has closed as low as $25.75 and retail investors are reportedly left with an unusually high share of the loss.

The share price decline that followed the Facebook IPO creates concerns that the securities regulation under the Securities Act of 1933 (Securities Act) places substantial

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[1] *See* Facebook Inc., Registration Statement (Form SR-1) (February 1, 2012).
[2] *See* Facebook Inc., Amendment No. 8 to Registration Statement (Form S-1) (May 16, 2012).
[3] See Lynn Cowan and Liz Moyer, *Facebook Slides Amid Roadshow Questions*, WALL ST. J., (May 22, 2012).

discretion in the hands of underwriters. One chief concern relates to the ability of underwriters to dictate pricing while only indirectly considering market supply-and-demand in their price evaluation. This "non-market-based approach" to IPOs flows from a regulatory structure in the Securities Act.

Under these securities laws and related regulation, it appears that underwriters have discretion to determine the price of an IPO, while subject to conflicts of interest stemming from economic relationships with those institutional clients that ultimately will purchase the bulk of an issuance. In conjunction with this discretion, communications restrictions and legal liability enable underwriters to provide information to institutional clients, while precluding access to the broader public. Given the concerns surrounding the Facebook IPO, Congress and the Commission should take a deeper look into this regulatory structure.

## II. The Cost of a Typical IPO

While Facebook sought and achieved an IPO price that appears to have exceeded its fair market valuation, more typical IPO pricing tends to discount the value of companies seeking to go public. Scholars have noted that "[the share-price of] firms conducting [IPOs] typically earn a return of approximately 15% on their first day of trading. While the magnitude of this initial return varies over time and as a function of firm characteristics, it shows no signs of dissipating."[4] An average 15% return to IPO investors reflects the sale of a company at a substantial discount.

Normally institutional investors purchase the vast majority of IPO shares. Aggarwal, Prabhala and Puri, authors of an academic study of allocations in domestic IPOs, analyzed the aggregate allocation to institutional and retail investors for 164 IPOs, finding "that institutions dominate IPO allocations, accounting for a median of about three-quarters of shares offered in an issue."[5] If institutional investors receive 75% of shares that are discounted by 15%, then, on a net basis, 11.25% of the capital raised in an IPO is given to institutional investors in the form of trading profits on the first day that it goes public.

Litigation risk provides underwriters a tool with which they can pressure issuers to accept this below market IPO pricing. "[IPO] underpricing decreases the expected litigation costs by reducing lawsuit probability."[6] Issuers that seek the full value of their firm in an IPO face the risk that if shares fall below the issue price, they will be hauled into court.

"IPO underwriters play a central role in determining the division of first day gains between different investors," generally favoring institutional clients by providing more shares when IPOs are expected to trade up strongly.[7] Institutional allocation is significantly lower when IPOs are less likely to appreciate in the aftermarket.[8] In the case of Facebook, it appears that the relatively high price for Facebook shares left the institutional investors with less

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[4] Michelle Lowry and Susan Shu, *Litigation Risk and IPO Underpricing*, J. OF FIN. ECON, at p. 1, (2002).
[5] Reena Aggarwal, Nagpumanand R. Prabhala, and Manju Puri, *Institutional Allocation in Initial Public Offerings*, Nat'l Bureau of Econ. Research (July 2002).
[6] Lowry and Shu, *supra* note 4 at 312.
[7] *See* Aggarwal, Prabhala, and Puri, *supra* note 5.
[8] *Id.*

opportunity for profit, hence institutions participated to a lesser extent and in some cases they shorted Facebook shares.[9]

The substantially discounted sales of an issuer's shares results from the underwriter's discretion to introduce IPOs into a *marketplace* using *non-market prices*. Pricing discretion creates a host of problems including litigation risk and undervaluation that act as a substantial cost to the issuer – occurring at the start of a new public company. The question remains, is it right to handicap companies that seek public capital by imposing a large tax on their value right at their outset? When pairing a 15% discount with a substantial underwriting fee, it's surprising that any company chooses to go public. Facebook, with its unusual leverage as a popular firm and massive IPO, managed to avoid these costs by extracting a higher price, which prevented the typical "price pop" while negotiating an extraordinarily low IPO fee of just 1.1%.[10] We will soon find out if they face a litigation penalty.

Imposing non-market-based charges, by under-pricing IPOs, places a direct drag on economic growth – it is a tax on the issuer of capital akin to hurting the goose that lays the golden eggs. At this crucial time, we must focus on what can better our economy and help us to stay on top of a global competition for investment capital. We must consider a market-based solution to the IPO process. While underwriters and institutions may see reduced profitability from a market approach in the short run, over the long run, domestic markets would likely capture a greater share of global capital formation. As a result, you would dramatically lower the costs of capital formation for issuers. When paired with reduced litigation risk from the mispricing of securities, it would increase domestic capital formation and grow a valuable pipeline of future IPOs, inevitably increasing the size of our capital markets, improving liquidity and creating the need for expanded services.

## III. Questions Relating to Regulation of IPOs in the Context of Facebook

Given my concerns, I seek to begin a discussion with you regarding the fundamental transformation of the IPO process. **Please answer the questions throughout this letter individually, specifying the exact question number you are responding to.**

### a. Discretion to Price the IPO

Given the IPO process provided for under the '33 Act enables the underwriter and issuer to exercise substantial discretion when determining the initial price for a public share offering;

1. Can this exercise of discretion lead to pricing error?

2. Do those in the position to determine IPO pricing, such as the underwriter(s), suffer any conflicts of interest? Please explain.

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[9] *See* Aggarwal et. al, *supra* note 5.

[10] Bill Conerly, *Facebook IPO Not a Flop*, FORBES (reprinted from Businomics Blog), May 24, 2012, *available at* http://www.forbes.com/sites/billconerly/2012/05/24/facebook-ipo-not-a-flop/

3. Did the exercise of pricing discretion in the Facebook IPO harm retail investors?

**b. Underpricing and Allocations**

The "non-market-based approach" IPO process creates substantial risk that IPOs are underpriced, presumably to generate a price jump that benefits IPO investors, or overpriced, which may generate litigation risks. This latter scenario appears to reflect the Facebook debacle. When shares are underpriced, the IPO investor obviously benefits by buying discounted shares. Given that institutional investors gain the lion's share of an IPO, it appears that institutional investors stand to benefit the most from an underpricing.

4. Please provide a summary of internal or external research the Commission has relied on with regard to IPO overpricing and underpricing throughout the past 20 years. I would like to know if the research provides a perspective on who benefits and who suffers harm from the potential mispricing of IPOs.

5. Do the vast majority of IPO shares go to institutional investors? Please provide summary data on the allocation of IPO shares generally over the past 20 years to institutional investors and other classes of privileged investors and ordinary investors.

**c. Barriers to Communicating with Investors**

The Securities Act enables underwriters to determine the price of the issuance while they develop support from select potential investors under protection from public debate on the issuers' valuation. The protection from public debate arises out of the restrictions to communicate outside of the prospectus. These communications restrictions generally fall within what is called the quiet period.[11] Separately, Rule 175 fails to properly carve out analyst research reports made by or on behalf of an issuer, or by a reviewer retained by the issuer, from 10b-5 legal liability. As a result of Rule 175, analyst research is withheld from retail investors and any other investor that poses a risk of litigation.

Limited public information regarding valuation issues preceded the Facebook IPO. On May 9th, in an amended Form S-1 Registration Statement, Facebook disclosed that mobile phone application-related risks may negatively affect results.[12] A few days later, Facebook publicly reported further changes, via another amended S-1 filing, stating that the initial price range of $28 to $35 per share would increase to $34-$38 a share and the total offering would grow by almost 25 percent.[13]

In contrast to limited public information made available via S-1 Registration Statements, private investors received substantially greater detail regarding downgrades to expected earnings. As early as May 9, 2012, Morgan Stanley, JPMorgan, Bank of America and Goldman

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[11] *See generally* U.S. Securities and Exchange Commission, Quiet Period, *available at* http://www.sec.gov/answers/quiet.htm . *See also* Securities Offering Reform, 70 Fed. Reg. 44,722 (Aug. 23, 2005).
[12] *See* Facebook Inc., Amendment No. 8 to Registration Statement (Form S-1) (May 16, 2012).
[13] *See Id.*

Sachs cut revenue forecasts, which they were only permitted to communicate orally to their customers, and not broadly to the public.[14] In an article dated May 23, 2012, Jennifer Van Grove reported on the downgraded expectations:

> The reduced figures, as shown in the table below, dramatically change the valuation of the company...

| Bank | full year 2012 estimate (new) | full year 2012 estimate (old) | full year 2012 % change | Q2 2012 estimate (new) | Q2 2012 estimate (old) | Q2 2012 % change | 2013 Earnings per share (new) | 2013 Earnings per share (old) | EPS % change |
|---|---|---|---|---|---|---|---|---|---|
| Morgan Stanley | $4,854,000,000 | $5,036,000,000 | -3.61% | $1,111,000,000 | $1,175,000,000 | -5.45% | $0.83 | $0.88 | -5.68% |
| Bank of America | $4,815,000,000 | $5,040,000,000 | -4.46% | $1,100,000,000 | $1,166,000,000 | -5.66% | $0.64 | $0.66 | -3.03% |
| JPMorgan | $4,839,000,000 | $5,044,000,000 | -4.06% | $1,096,000,000 | $1,182,000,000 | -7.28% | $0.66 | $0.70 | -5.71% |
| Goldman Sachs | $4,852,000,000 | $5,169,000,000 | -6.13% | $1,125,000,000 | $1,207,000,000 | -6.79% | $0.63 | $0.68 | -7.35% |

> "The reduction to Facebook's forecasts of this magnitude — reducing the revenue growth rate by over 6 percentage points — is so material that it should absolutely have been disclosed in a revised S-1 filing before the IPO pricing," [financial data company PrivCo CEO Sam Hamadeh] said. "The combined net effect for Facebook in this case of both the reduction in the financials and the valuation multiple would have lowered Facebook's valuation by at least one third."[15]

At least two of the underwriters lent shares to enable hedge funds to execute short sales to take advantage of their informational advantage.[16] The negative views provided by the analysts succeeded in reducing the institutions' valuation of Facebook. As of Friday, May 18th, the first day Facebook shares traded, 25% of trading volume was attributed to short sales.[17] The informational disadvantage to the less informed public proved harmful.

6. Do communications restrictions within the Securities Act inhibit price discovery in the IPO process?

7. Does the SEC recognize that the "quiet period" rules and legal liability under Rule 175 provide institutional investors with an informational advantage over ordinary investors?

8. Does the SEC agree that the quiet period is more and more difficult to enforce given advances in communications and information technology? Please comment on the costs and benefits of enforcing communications restrictions given current technology.

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[14] *See* Alistair Barr, *Insight: Morgan Stanley cut Facebook estimate just before IPO*, REUTERS (May 22, 2012).
[15] *See* Jennifer Van Grove, *The Severe Facebook Revenue Revisions that Sent Investors Running*, (May 23, 2012), *available at* http://venturebeat.com/2012/05/23/facebook-revised-revenue-estimates/
[16] *See* Tom Lauricella, Jenny Strasburg, and Jonathan Cheng, *Short Sellers Find Friends in Banks*, WALL ST. J., May 24, 2012.
[17] *Id.*

9. Please explain how restricting ordinary investors' access to marketing materials from an issuer protects ordinary investors. Is the quiet period intended to protect ordinary investors from themselves? In other words, is "puffing" or misleading investors with exaggerated marketing the Commission's primary concern?

10. Does the Commission expect that "puffing" of an issuer would likely be offset by differing views that can be quickly and efficiently publicized in internet articles, blogs and other forms of modern communication?

11. Does the Commission believe the elimination of the up-tick rule, the prevalence of hedge funds and other proprietary traders that seek to short overvalued shares, and other changes to the marketplace largely eliminate concerns related to "puffing"?

Rule 175 is a rule that appears to protect an issuer or its underwriters from 10b-5 liability as it relates to forward looking statements, such as earnings forecasts; however, many argue the rule was poorly constructed and fails to properly eliminate liability. Subjective requirements within Rule 175,[18] such as a requirement for a reasonable basis and good faith, create barriers that prevent underwriters from relying on Rule 175. As a result, underwriters withhold research that contains forward looking statements from retail investors and even from some institutional investors. In contrast, when it comes to publicly traded companies, Section 27A[19] provides reasonable protection from liability for the same type of forward looking research. It seems that the liability construct provided under Rule 175 needlessly prevents ordinary investors from receiving valuable information regarding IPOs.

12. Do analysts that work within research departments of broker-dealers suffer potential liability under Rule 175(a) if their analysis fails to accurately predict the performance of an IPO issuer?

13. Does the Commission believe it is reasonable to expect that analysts' estimates are accurate ex-post, and is it reasonable that any liability should be associated with something as unrealistic as predicting the future?

14. Do subjective requirements for a reasonable basis and good faith open the door to needless and excessive litigation, and acts to prevent ordinary investors from receiving valuable information?

15. Does the Commission believe that, under Section 27A, these same analysts can provide earnings estimates for publicly traded companies without being subject to legal liability if, ex-post, their earnings fail to meet the estimates? Please explain the substantive basis for treating analysis of an IPO issuer differently than the analysis of a public company.

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[18] U.S. Securities and Exchange Commission, General Rules and Regulations promulgated under the Securities Act of 1933, Liability for certain statements by issuers, 17 C.F.R. § 230.175 (2011).

[19] Securities Act of 1933 §27A, Application of safe harbor for forward looking statements, 15 U.S.C. § 77z-2 (2011).

16. Consistent with Section 27A of the Securities Act, would the Commission consider modifying Rule 175 to provide a broad safe harbor with regard to forward looking information relating to an issuer? Specifically would you revise Rule 175a to eliminate the subjective aspects of that subsection?

Section 105 of the JOBS Act enables broker dealers to publish research reports relating to Emerging Growth Companies, which include those public companies with less than $1 billion revenue annually, and expands the ability of issuers to communicate with analysts. While a step in the right direction, research will still be subject to Rule 175.

17. Is it the Commission's interpretation that research relating to Emerging Growth Companies will still be subject to Rule 175? Does this mean that, even in the case of these relatively smaller companies that seek to go public, retail investors will suffer the same informational disadvantage?

18. Does the Commission believe expanding access to research for retail investors could enhance information dissemination, attract additional investors and lower the cost of capital for these smaller companies?

19. Given that limited access and a higher cost of capital disproportionately affects smaller issuers, would the Commission consider addressing the informational disadvantage to retail investors by modifying Rule 175 at least in the case of Emerging Growth Companies? (If you are unwilling to modify Rule 175 generally).

20. Given the direction of law and regulation under Section 105, isn't it time to recognize that the quiet period rules no longer provide substantive benefits to the marketplace and are also inconsistent with the Supreme Court's recent interpretation of the First Amendment?

**d. Constitutional Concerns**

21. How does the Commission reconcile the quiet period rules, which effectively restrict an issuer's communications to ordinary investors, with the Supreme Court's decision in Lorillard where the Supreme Court's applied a four part test, developed in Central Hudson, and applied in Lorillard. The four prong test states "the Court must determine (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than necessary to serve the government's interest." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 527 (2001).

22. The "ban on general solicitation" relates to marketing investments for private offerings that ordinary investors typically cannot access; and therefore these ordinary investors do not suffer direct harm. However, as seen in the case of the Facebook IPO, and the stunted communications resulting from the S-1

Registration Statement process, the "quiet period" communications restrictions do harm ordinary investors. Please assert the Commission's substantial interest that justifies this harm.

**e. Market Price as Best Measure of Fair Market Value**

In contrast to the non-market-based IPO process, when it comes to accounting for the fair value of financial assets and liabilities, including securities, the Commission clearly recognizes market price as the best measure of fair value. The accounting rules of the Financial Accounting Standards Board (FASB) that apply to the valuation of financial assets and liabilities, and which are directly approved by the Commission, define fair value as "[t]he price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date."[20] Financial Accounting Standard No. 157 provides a clear hierarchy to determine fair market value, where market prices are considered the most reliable, further clarifying that market prices provide the best measure of fair value.[21]

Similarly, when the Commission evaluates securities for market manipulation, or for a failure to timely report material information, once again market prices are absolutely crucial and central to the evaluation. Commission economists, by applying event studies, evaluate securities market prices and changes to those market prices to determine whether an issuer's misstatements regarding its company are material. The Commission determines compensatory damages based on this market-based approach. The imposition of damages based on such an analysis reflects the weight and reliance that the Commission, guided by the Supreme Court, places on the market price for publicly traded shares.[22] In fact, a wrongdoer suffers significant financial liability, reputational risk, and even criminal liability from potential adverse outcomes under such event studies.

Given that market value plays such a central role in confirming the accuracy of financial statements and in evaluating material misstatements and securities fraud, it does not appear consistent to apply a non-market model when it comes to setting an IPO price.

23. Given the Commission's reliance on market price for the accounting of financial assets and liabilities and via event studies for the measurement of damages, it is clear the Commission considers market price as the best determinant of fair market value. Please provide an explanation as to why the Commission considers market price as the best determination of market value and contrast this to the non-market approach applied to traditional IPOs.

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[20] FIN. ACCOUNTING STANDARDS BD., ORIGINAL PRONOUNCEMENTS AS AMENDED, Statement of Fin. Accounting Standards No. 157: Fair Value Measurements (2010).
[21] *Id.*
[22] *See* Jonathan R. Macey, Geoffrey P. Miller, Mark L. Mitchell, and Jeffry M. Netter, *Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of Basic v. Levinson* (Yale Law Sch., Faculty Scholarship Series Paper No. 1639, 1991), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2684&context=fss_papers.

24. If, using market prices and changes to market prices within an event study, the Commission can deem a price to be artificial, does the Commission view material price changes that immediately follow an IPO as evidence of artificial prices? In other words, doesn't the common post-IPO "pop" in a share price reflect artificial under-pricing?

25. Does the common post-IPO "pop" reflect positively or negatively on the efficiency of the securities markets?

26. Does the Commission have the authority or ability to impose a market-based IPO price determination process without legislation?

27. Does the Commission believe that market-based IPO pricing would result in more accurate pricing, or a fairer market valuation, when compared to the type of IPO process that was applied in the Facebook issuance?

**f. A Market-based Alternative – the Dutch auction**

While the Facebook IPO, underwritten by Morgan Stanley, may have generated outsized losses for ordinary investors, Google's IPO via "Dutch auction," also underwritten by Morgan Stanley, reflected free market ideals and provided ordinary investors with a unique opportunity to participate alongside institutions. The Google IPO provided a rare glimpse into a market-driven system that many would argue was fairer than what was done at Facebook. As the executives of Google stated in their letter to prospective shareholders:

> It is important to us to have a fair process for our IPO that is inclusive of both small and large investors. It is also crucial that we achieve a good outcome for Google and its current shareholders. This has led us to pursue an auction-based IPO for our entire offering. Our goal is to have a share price that reflects an efficient market valuation of Google that moves rationally based on changes in our business and the stock market.[23]

28. Would a market-based auction model, such as a Dutch auction, eliminate the pricing discretion exercised by the underwriter and issuer?

29. Does the Commission believe in the principle where, if an auction is opened up to all investors, access to information regarding the issuer should be expanded as well?

30. Does the Commission recognize that the use of Form S-1 Registration Statements to update the public is a burdensome, slow and expensive process that hampers information dissemination that would enable a greater understanding of an issuer's value?

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[23] Google Inc., Letter from the Founders, Amendment No. 9 to Registration Statement (Form SR-1), at 27 (Aug. 18, 2004).

31. Would the Commission recommend to Congress the complete abandonment of the "non-market-based approach" provided for under the 1933 Act and, instead, require a market based approach, such as a Dutch auction that the issuer opens to all market participants? Please explain why or why not.

32. Does the Commission believe that, if the ability to sell shares short applied directly to the setting of a market clear price within a Dutch auction process, then this would this help to ensure accurate pricing by enabling sophisticated short-sellers to reduce the potential that puffing causes an artificially high price?

33. Would the Commission consider allowing for short sales to be incorporated when calculating the market clearing price in a Dutch auction for IPO shares?

34. Please provide the Committee with information on whether allowing short sales within the Dutch auction could act to eliminate concerns for "puffing" by opening up the IPO to a broader set of initial investors/traders.

## IV. Conclusion

Google had a successful IPO that benefitted from broad participation. However, few companies have followed in their footsteps.[24] I would like to better understand any barriers that prevent firms from issuing IPOs via Dutch auctions.

In this day and age, under fierce global competition for capital, we must modernize regulations alongside our vastly changing economic landscape. If we stand still while the global economy evolves, we will be left behind. China, Brazil, India, Singapore, Turkey, Canada, Chile and other markets currently work to devise, or already provide, more attractive regulatory environments that draw capital away from the United States. If, in the face of this reality, we continue to protect, over-regulate and coddle our financial institutions, our capital markets will grow weaker. Illiquidity begets illiquidity and as capital issuances tend to go to other markets, the domestic cost of capital will continue to rise.

As we consider means to improve capital formation, we must revisit the Securities Act of 1933. The investment banks were given almost 80 years to enjoy this flawed law, fraught with conflicts of interest and incentives to misprice shares. Among other things, I ask that you take advantage of the vast improvements in communications technology to protect investors while unleashing capital formation to strengthen our economy.

The Committee on Oversight and Government Reform (the Committee) is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

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[24] Steve Gelsi, *Google IPO auction made splash*, MARKETWATCH, (Aug. 18, 2005), *available at* http://www.marketwatch.com/story/google-made-splash-but-didnt-start-ipo-wave.

We request that you provide the requested information as soon as possible, but no later than 5:00 p.m. on July 3, 2012. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Peter Haller or Brian Daner of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

Majority (202) 225-5074
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**Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157of the Rayburn House Office Building and the Minority Staff in Room 2471of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

## Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.